Supreme Court, U.S.
FILED
APR 10 2003

02-1324

IN THE

Supreme Court of the United States

ANNE LOCKSLEY,

Petitioner,

—v.—

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BETTINA B. PLEVAN
Counsel of Record
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New York, New York 10036
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Counsel for Respondents

STATEMENT PURSUANT TO RULE 29.6

Fried, Frank, Harris, Shriver & Jacobson does not have any corporate parents, subsidiaries or affiliates that are publicly traded.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals properly dismissed the appeal where Petitioner filed the notice of appeal 40 days after the District Court entered final judgment dismissing the action, and the appeal did not qualify for any of the exceptions to the requirement that a notice of appeal in a civil case be filed 30 days after final judgment is entered?

2. Whether the Court of Appeals properly found that the District Court did not abuse its discretion in finding that Petitioner failed to establish "good cause" or "excusable neglect" and denied the motion for an extension of time to file a notice of appeal where the Federal Rules that Petitioner, an attorney, claims to have "misread" in calculating the time within which to file the appeal are clear and unambiguous, and there is no interpretation of those Rules that supports Petitioner's claimed misreading?

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RESPONDENTS' BRIEF IN OPPOSITION

Petitioner, an attorney, seeks a writ of certiorari, apparently with the intent of arguing that she was improperly subjected to "medical practice" and that certain unspecified conclusions should not have been accepted as expert opinions. Her garbled arguments present no legal issues for review.

The procedural issues raised in the petition do not present questions warranting review by this Court. The order dismissing the appeal in Docket No. 02-7516 as untimely and the order affirming the denial of the motion for an extension of time in Docket No. 02-7584 were based upon undisputed facts and correct interpretations of federal law, and the petition presents no legal question warranting this Court's review. The decisions of the Court of Appeals are correct and do not conflict with any decision of this Court or of any Court of Appeals. Accordingly, further review is not warranted and the Petition for a Writ of Certiorari should be denied.

JURISDICTION

The U.S. Court of Appeals for the Second Circuit filed two Orders on January 23, 2003. The Petition for a Writ of Certiorari was filed on March 10, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

COUNTERSTATEMENT OF THE CASE

A. Background

Petitioner Anne Locksley is a graduate of Columbia Law School and an attorney admitted to practice in the New York State Courts and two federal district courts. (Pet. at 9).[1] Petitioner was employed as a summer associate at the law firm of Fried, Frank, Harris, Shriver & Jacobson ("Fried Frank") during 1998. (Pet. at 9). On November 9, 2001, she commenced this action (acting as attorney pro se) against Fried Frank and several of its partners (collectively "Respondents") in the District Court for the Southern District of New York, filing a 103-page complaint alleging claims under theories of antitrust, defamation, conversion and invasion of privacy. (Pet. App. at 23a).

On January 3, 2002, the District Court dismissed the complaint *sua sponte*, without prejudice, finding that it failed to state a claim or comply with the "short and plain statement" requirement under Fed. R. Civ. P. 8(a). (Pet. App. at 23a-26a). In the order, the District Court gave Petitioner an opportunity to amend her complaint with the precondition that she first attend a court conference. (Pet. App. at 26a). Petitioner failed to attend the conference scheduled for January 18, 2002. (Pet. App. at 17a). Nevertheless, that same day, she served an amended complaint of 58 pages. (Pet. App. at 17a, 18a).

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[1] References to "Pet. at ____" refer to pages of the Petition for a Writ of Certiorari. References to "Pet. App. at ____" are pages of the Appendices attached to the Petition. References to "Resp't App. at ____" are pages annexed hereto as Appendices.

By order dated January 25, 2002, the District Court dismissed the amended complaint *sua sponte*, this time with prejudice, holding that the amended complaint suffered from the same defects as the original complaint and noting the facial lack of merit to the clams being made as well as Petitioner's failure to comply with the Court's prior decisions. (Pet. App. at 18a). Final judgment was entered on February 1, 2002. (Pet. App. at 14a).

Forty days later, on March 13, 2002, Petitioner filed a notice of appeal in the District Court, purporting to appeal the dismissal of her amended complaint (Docket No. 02-7516). (Pet. App. at 14a; Resp't App. at 5a-6a, 7a).

B. The District Court's Denial of Petitioner's Request For An Extension Of Time To Appeal

On March 26, 2002, after being notified that her notice of appeal was untimely, Petitioner moved in the District Court, pursuant to Fed. R. App. P. 4(a)(5), for an extension of time to file a notice of appeal. (Resp't App. at 1a-8a). In support of her motion, Petitioner argued that she had relied on Fed. R. App. P. 26(a)(2) and Fed. R. Civ. P. 6 and excluded weekends and holidays when she calculated the 30-day period in which she had to file her notice of appeal. (Pet. App. at 14a; Resp't App. at 1a, 3a-4a). She argued that Fed. R. App. P. 4(a) and 26(a)(2), and also Fed. R. Civ. P. 6, contain "discrepant rules of computation" of time, and asked the District Court to deem her miscalculation excusable neglect. (Resp't App. at 1a, 3a-4a).

By order dated April 9, 2002, the District Court denied the motion, ruling that Petitioner had failed to demonstrate "good cause" or "excusable neglect" as required by Fed. R. App. P. 4(a)(5). (Pet. App. at 14a-15a). In addition to holding that Petitioner's "misreading" of Fed. R. App. P. 26(a)(2) was not

excusable neglect or good cause, the District Court noted that Petitioner was a law school graduate, an attorney and had "repeatedly failed to meet deadlines in th[e] case." (Pet. App. at 15a). Locksley filed a notice of appeal on May 8, 2002 (Docket No. 02-7584).

C. The Court of Appeals' Review

On November 27, 2002, Respondents moved to dismiss the appeal from the February 1 judgment (Docket No. 02-7516) on the grounds that it was untimely and sought summary affirmance of the District Court's April 15 order denying Petitioner's motion for an extension of time to file a notice of appeal (Docket No. 02-7584).

The Court of Appeals, by Order filed on January 23, 2003, dismissed the appeal from the February 1 judgment (Docket No. 02-7516), holding that it lacked jurisdiction because Petitioner's notice of appeal was untimely filed. (Pet. App. at 1a). In a second Order, filed the same day, the Court of Appeals summarily affirmed the District Court's decision, ruling that the Court had "properly denied [Petitioner] an extension of time in which to file an appeal under Fed. R. App. P. 4(a)(5)." (Resp't App. at 9a-10a).

D. Petition For Writ of Certiorari

On March 10, 2003, Petitioner filed this Petition for a Writ of Certiorari. Petitioner ignores the fact that her suit was dismissed on procedural grounds and apparently seeks to argue her case to this Court on the "merits." (Pet. at 19). Although her arguments are disjointed and difficult to comprehend, she purports to state two "reasons for granting [the] writ." Specifically, she argues that (1) she was improperly subjected to "medical practice" and (2) certain conclusions should not have been (allegedly) accepted as expert opinions. (Pet. at 18-

19). Thus, Petitioner does not appear to be challenging the dismissal of her appeal or the affirmance of the District Court's decision denying her motion for an extension of time to file a notice of appeal or raising them as issues for review.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE COURT OF APPEALS PROPERLY DISMISSED PETITIONER'S APPEAL FROM THE FEBRUARY 1, 2002 JUDGMENT AS UNTIMELY

Although not expressly addressed by Petitioner, there is no basis to grant review to decide whether the Court of Appeals improperly dismissed her appeal as untimely. Because this claim raises no novel issues, disputed questions of law or conflict between the circuits, certiorari should be denied.

Pursuant to 28 U.S.C. § 2107(a) and Fed. R. App. P. 4(a)(1)(A), a party who wishes to appeal in a civil case must file a notice of appeal within 30 days of the entry of the judgment or order from which the appeal is taken. This time limit is "mandatory and jurisdictional." *Browder v. Dir., Dep't of Corr.*, 434 U.S. 257, 264 (1978) (quoting *United States v. Robinson*, 361 U.S. 220, 229 (1960)); *see also Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 61 (1982) (per curiam). The rule serves the purpose of fixing the point at which litigation shall end -- if an appeal has not been taken before that date -- thereby relieving a prospective appellee from the appellant's demands. *See Browder*, 434 U.S. at 264; *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943).

The District Court entered the final judgment dismissing Petitioner's amended complaint on February 1, 2002. Although Petitioner's time to appeal began to run on February

1, she did not file her notice of appeal until 40 days later, on March 13, 2002. Accordingly, her notice of appeal was indisputably untimely and was properly dismissed for lack of appellate jurisdiction.

II. THE COURT OF APPEALS PROPERLY AFFIRMED THE DENIAL OF PETITIONER'S MOTION FOR AN EXTENSION OF TIME IN WHICH TO FILE A NOTICE OF APPEAL

Petitioner does not explicitly seek review of the denial of her motion for an extension of time to file a notice of appeal. The District Court did not grant an extension in this case because Petitioner could not make the required showing of "good cause" or "excusable neglect." The Court of Appeals properly reviewed that decision for abuse of discretion. *See Goode v. Winkler*, 252 F.3d 242, 245 (2d Cir. 2001); *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993). Because the Court of Appeals' decision to affirm the denial of the motion for an extension of time does not raise a novel issue, disputed question of law or conflict between the circuits, this Court's review is not warranted and the petition should be denied.

When a party aggrieved by a judgment fails to file a timely notice of appeal, the district court, upon a finding that the failure was the result of "good cause" or "excusable neglect," has limited authority to grant additional time in which to file the notice. Fed. R. App. P. 4(a)(5). This Court has identified four factors that should be considered in evaluating whether a party's neglect is excusable:

> we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . the danger of

> prejudice to the [non-movant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Pioneer, 507 U.S. at 395. The four factors, however, do not carry equal weight, and "the excuse given for the late filing must have the greatest import." *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir.), *reh'g denied en banc*, Nos. 99-1850, 99-1805, 2000 U.S. App. LEXIS 12174 (8th Cir. June 2), *cert. denied*, 531 U.S. 929 (2000); *see Graphic Communications Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 5 (1st Cir. 2001).

Petitioner's sole argument in support of her motion to extend her time to appeal was that in calculating the 30-day time period in which she was required to file her appeal, she eliminated weekends and holidays. She claimed that Fed. R. App. P. 4(a)(1)(A) and 26(a)(2) (and Fed. R. Civ. P. 6) contain "discrepant rules of computation" of time, and asked the District Court to deem "the discrepancy excusable neglect." There is, however, no reading of the law under which the reason offered by Petitioner for her untimely filing could satisfy the requirement of "excusable neglect" or "good cause."

Petitioner's claim that she "misread" the rules is precluded by the express language of Fed. R. App. P. 26(a)(2) and Fed. R. Civ. P. 6, which is clear and unambiguous. Fed. R. App. P. 26(a)(2) states that: "in computing any period of time specified in these rules or in any local rule . . . [e]xclude intermediate Saturdays, Sundays, and legal holidays *when the*

period is less than 7 days, unless stated in calendar days."[2] Fed. R. App. P. 26(a)(2) (emphasis added). Fed. R. Civ. P. 6(a) provides similarly: "When the period of time prescribed or allowed *is less than 11 days*, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation." Fed. R. Civ. P. 6(a) (emphasis added). The language of the Rules is plain and unambiguous, and there is no interpretation that authorizes intervening weekends and holidays to be excluded from the calculation when the period at issue is 30 days.

Petitioner presented no justification for her alleged misreading of unambiguous rules, and the Court of Appeals properly found that the District Court acted well within its discretion in denying her motion for an extension of time. Indeed, this Court has recognized that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable neglect.'" *Pioneer*, 507 U.S. at 392. In this case, Petitioner's untimeliness was not the result of a plausible misconstruction of the Federal Rules, but rather a failure to comply with the plain language of the Rules. Petitioner is an attorney admitted to practice in New York, and should have been able to read the express language of the Rules. Moreover, even if she were not an attorney, her *pro se* status could not excuse her failure to read or understand Fed.

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[2] When Petitioner filed her notice of appeal, Fed. R. App. P. 26(a)(2) provided for the exclusion of weekends and legal holidays from the calculation of time when the time period was less than seven days. Effective December 1, 2002, Rule 26(a)(2) was amended to track the language of Fed. R. Civ. P. 6(a), and now provides that intermediate weekends and legal holidays should be excluded when the period is less than eleven days. *See* Fed. R. App. P. 26(a)(2) (as amended)

R. Civ. P. 26(a)(2). *See McNeil v. United States,* 508 U.S. 106, 113 (1993) ("[W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel."); *Edwards v. INS*, 59 F.3d 5, 8 (2d Cir. 1995) (holding that *pro se* litigants "generally are required to inform themselves regarding procedural rules and to comply with them").

Under the facts of this case, the Court of Appeals properly found that the District Court did not abuse its discretion. It was clearly within the District Court's discretion to focus on the reason for Petitioner's late filing and find that Petitioner's claimed misreading of Fed. R. App. P. 26(a)(2) did not constitute excusable neglect. *See Graphic Communications,* 270 F.3d at 8 (affirming denial of motion for extension of time where counsel believed he had 60, not 30, days to file notice of appeal, and noting that "[t]o find this neglect to be 'excusable' would only serve to condone and encourage carelessness and inattention in practice before the federal courts, and render the filing deadline set in Fed. R. App. P. 4(a)(1) a nullity"); *Advanced Estimating Sys., Inc. v. Riney*, 130 F.3d 996, 998 (11th Cir. 1997) ("That the four-part *Pioneer* standard for determining excusable neglect applies does not change existing law that a lawyer's misunderstanding of clear law cannot constitute excusable neglect. If it could, almost every appellant's lawyer would plead his own inability to understand the law when he fails to comply with a deadline."); *Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 465, 469 (5th Cir. 1998) (ruling that trial court abused its discretion in finding "excusable neglect" where counsel claimed he filed late notice of appeal because he mistakenly believed he had timely moved for new trial under Fed. R. Civ. P. 6(e) and thereby suspended his time to appeal), *cert. denied,* 526 U.S. 1005 (1999); *Weinstock v. Cleary, Gottlieb, Steen & Hamilton*, 16 F.3d 501, 502-03 (2d Cir. 1994) (noting that misconception of appellate rules did not constitute excusable

neglect; "[t]he excusable neglect standard can never be met by a showing of inability or refusal to read and comprehend the clear language of the federal rules") (citations omitted).

Accordingly, there can be no question that, given the circumstances of this case and the explanation Petitioner offered for her untimely filing, the Court of Appeals properly affirmed the District Court's decision denying the motion for an extension of time to file a notice of appeal.

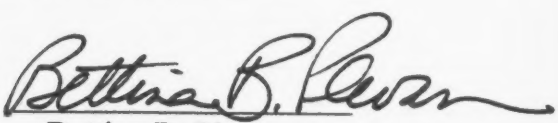
CONCLUSION

For each of these reasons, this Court should deny the Petition for a Writ of Certiorari.

New York, New York
April 7, 2003

Respectfully submitted,

PROSKAUER ROSE LLP

By: 

Bettina B. Plevan
1585 Broadway
New York, New York 10036
(212) 969-3000
Counsel for Respondents

Of Counsel:
Amy F. Melican

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANNE LOCKSLEY,	:	
Plaintiff,	:	MOTION FOR AN EXTENSION OF TIME TO FILE A NOTICE OF APPEAL
-against-	:	
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON, INC., JOSEPH STERN, HOWARD ADLER, JANICE McAVOY, ARTHUR KAUFMAN, PAUL JACOBSON, FREDERICK FOGEL, JOANNE GANEK, PETER V.Z. COBB,	:	01 Civ. 9920 (DC) Docket No.
Defendants.	:	

Pursuant to Fed. R. App. P. 4(a) (5), Locksley respectfully requests leave to file the within notice of appeal out of time. Locksley desires to appeal the judgment in this action entered on February 1, 2002, but failed to file a notice of appeal within the required number of days because:

[Explain here the "excusable neglect" or "good cause" which led to your failure to file a notice of appeal within the required number of days.]

The required number of days from date of entry of judgment was computed by Locksley using the Federal Rules of Appellate Procedure Rule 26, such that Locksley excluded Saturdays and Sundays and legal holidays and the day of the

event, such that the 30 day time interval was overestimated according to the Pro Se Office.

/s/Anne Locksley
Signature

360 E. 88th Street, Apt. 33B
Address
New York, NY 10128
Tel. No. (212) 369-5644

DATE: March 25, 2002

Note: You may file this form, together with a copy of Form 1, if you are seeking to appeal a judgment and did not file a copy of Form 1 within the required time. If you follow this procedure, these forms must be received in the office of the Clerk of the District Court no later than 60 days of the date which the judgment was entered (90 days if the United States or an officer or agency of the United States is a party).

Form 2-CA/SNY-8/87

"MOTION FOR EXCUSABLE NEGLECT"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANNE LOCKSLEY,	:	
Plaintiff,	:	
-against-	:	01 Civ. 9920 (DC)
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON, INC., JOSEPH STERN, HOWARD ADLER, JANICE McAVOY, ARTHUR KAUFMAN, PAUL JACOBSON, FREDERICK FOGEL, JOANNE GANEK, PETER V.Z. COBB,	:	
Defendants.	:	

STATE OF NEW YORK)
) SS: 241 78 4833
COUNTY OF NEW YORK)

I, Anne Locksley, am plaintiff in the above-entitled action, and respectfully move this Court to grant a 30-day extension in which to process plaintiff's notice of appeal received on March 13, 2002. The reason why I am entitled to the extension is that Federal Rules of Appellate Procedure Rule 26 provides for exclusion of Saturdays, Sundays and legal holidays, and day of act that begins the period even when the period is less than 7 days, and I computed the 30 days after

entry of judgment appealed from accordingly, to the date March 18, 2002. The Federal Rules of Civil Procedure Rule 6 also provides for exclusion of Saturdays, Sundays and legal holidays, and day of act that begins the period, and computation of the 30 days after entry of judgment appealed from results in the date March 18, 2002.

The Pro Se Office deems receipt on March 13, 2002 untimely within 30 days as of entry on February 1, 2002 without further statement as to discrepant rules of computation that would cause the Pro Se Office to deem receipt untimely if this motion is not received prior to April 2, 2002.

WHEREFORE, I respectfully request that the Court grant the within motion to deem receipt timely as of March 13, 2002 or in the alternative to deem the discrepancy excusable neglect, resulting from computation of the 30-day interval using FRCP Rule 6 and FRAP Rule 26 rather than the calendar inclusively of Saturdays, Sundays, and legal holidays.

Dated: March 25, 2002
New York, New York

/s/Anne Locksley
Signature

360 E. 88th Street, Apt. 33B
Address
New York, NY 10128
City, State & Zip Code

Form 1

NOTICE OF APPEAL TO A COURT OF APPEALS

FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

United States District Court for the Southern District of New York

File Number 01 Civ. 9920 (DC)

ANNE LOCKSLEY,	:	
Plaintiff,	:	NOTICE OF APPEAL
-against-	:	
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON, INC., JOSEPH STERN, HOWARD ADLER, JANICE McAVOY, ARTHUR KAUFMAN, PAUL JACOBSON, FREDERICK FOGEL, JOANNE GANEK, PETER V.Z. COBB,	:	
Defendants.	:	

Notice is hereby given that Anne Locksley, Plaintiff in the above-named case, hereby appeals to United States Court of Appeals for the Second Circuit from an order of dismissal sua sponte with prejudice as to the claims actually

asserted, entered in this action of the 1 day of February, 2002.

(S) /s/Anne Locksley
Appellant Pro Se

Address

360 E. 88th Street, Apt. 33B
New York, NY 10128

PRO SE OFFICE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
OFFICE OF THE CLERK
U.S. COURTHOUSE
500 PEARL STREET
NEW YORK, NY 10007

JAMES M. PARKISON
CLERK

Date: March 18, 2002

Re: Locksley v. Fried, Frank, Harris, Shriver & Jacobson, Inc., et al.
01 Civ. 9920 (DC)

Dear Sir or Madam:

Please be advised that this office received your notice of appeal on March 13, 2002. Under Rule 4 of the Federal Rules of Appellate Procedure, a notice of appeal must be filed with the clerk of the district court within 30 days after the entry of the judgment or order appealed from. Since the judgment dismissing the action was entered on Feb. 1, 2002, your notice of appeal was received untimely.

Rule 4(a) (5) provides that you may ask the district court for a 30-day extension in which to file your notice of appeal upon showing excusable neglect. If you wish to ask the court for this extension, you must submit a motion stating the reason(s) why your appeal was received untimely. The motion should be entitled "Motion for Excusable Neglect". It has to be served on the other parties. The enclosed forms for a "Motion for Excusable Neglect" plus "Affirmation of Service" should be filled out, signed in ink and returned to the Pro Se Office.

Your notice of appeal will be held in this office until Apr. 2, 2002. If we have not received your motion for an extension of time by that date, your notice of appeal will be processed as untimely. If you have any questions concerning this letter, please contact this office.

Sincerely,
/s/
The Pro Se Office
(212) 805-0175

encs.

S.D.N.Y
01-CV-9920
Chin, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23rd day of January two thousand and three,

Present:

Hon. Jon O. Newman,
Hon. Robert A. Katzmann,
Hon. Reena Raggi,
Circuit Judges.

Anne Locksley,

Plaintiff-Appellant,

v. 02-7584

Fried, Frank, Harris, Shriver & Jacobson, *et al.*,

Defendants-Appellees.

Appellees move for summary affirmance of the district court's order denying the appellant's motion for an extension of time in which to file an appeal under Fed. R. App. P. 4(a)(5).

Appellant moves for various forms of relief including, *inter alia*, judgment in her favor, penalties imposed on the appellees, and permission to submit more documents relating to the present appeal. Upon due consideration, it is ORDERED that the motion for summary affirmance is granted, and the appellant's pending motions are denied, as the district court properly denied the appellant an extension of time in which to file an appeal under Fed. R. App. P. 4(a)(5).

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: /s/ Lucille Carr